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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE GILA BEND RESERVOIR AND IRRIGATION COMPANY

vs.

THE GILA WATER COMPANY.

Appeal from the Supreme Court of the Territory of Arizona.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Appellant prays the court for a rehearing in the above-entitled cause, and to rescind and vacate its judgment entered therein on May 14, 1906, and in support of his application respectfully submits the following considerations:

The record is somewhat involved and confusing, but it shows clearly that the court was misled in two important particulars as to the actual predicament of the facts upon which its judgment was invoked.

It is evident from the opinion—

1. That in the decision of the cause the court acted upon the assumption that the "findings of fact" by the court below were lacking in specific detail, and were mere generalities.

2. That, under this impression, it accepted as actual facts in the case certain material facts stated in the

opinion of the court below and approved the reasoning and the conclusion reached by that court based upon them.

As the matter appears to counsel the court below and this court acted upon mistaken premises in both instances.

I.

The Findings of Fact in the Court Below.

This court say in the opinion:

> "The findings of fact by the Supreme Court are *very general;* they are *only* that the appellant had not, at the commencement of the action, any cause of action in respect of the property and has not now any right, title, or interest therein; that the appellee was the owner in fee simple and in possession thereof."

These so-called "findings of fact" are obviously mere conclusions of law, and if the findings certified by the Supreme Court of the Territory contained nothing more, this court might well have been forced to look, as it did look, to the opinion of that court for the facts upon which such conclusions were based.

The certificate of the court below as to its findings of fact is, however, not thus meager, but is full and explicit, and, as will be presently shown, the statement of facts in its opinion, and upon which this court relied, is not supported by the statement of facts in its certificate, and is widely variant therefrom.

The record discloses (pp. 45, 46), that a statement or finding of facts was signed and certified by the Supreme Court of the Territory, and that the "Circumstances and Evidence, as certified and signed on the 24th day of November, 1902, of Edward Kent, the presiding judge, who tried this cause below," were made part of the statement or finding, "the same as if it were set forth at length"

therein. The "Circumstances and Evidence," so certified and signed by the trial judge and which thus became a part of the findings, will be found on pages 18 to 30 of the record. The formal findings conclude with the statement (Rec., p. 46), "that from the foregoing record and facts" the court finds against the appellant and in favor of the appellee.

There are no less than three findings of fact to be found in the transcript—one of them, the findings in a case other than the case at bar and introduced as evidence in the latter case (Rec., pp. 24–27); one of them, the findings of the Supreme Court of the Territory in the case at bar (Rec., 45, 46, and 18–30), and the remaining one, the findings of the trial judge in the case at bar (Rec., 35, 36). Inasmuch as the findings of the trial judge fully deserve the criticism of being very general, and as consisting of mere conclusions of law, while the findings of the Territorial Supreme Court do not, it is respectfully suggested that this court mistakenly assumed the findings of the former court to have been those of the latter, and in so doing reached a conclusion not justified by the record.

The object of the appeal was to have the question determined, whether the conclusions of the court below and its judgment were sustained by its statement or findings of fact, and in case of conflict betwen the facts as stated in its opinion and as given in its statement or finding, the latter must prevail.

> "The jurisdiction of the court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."
>
> Harrison *vs.* Perea, 168 U. S., 323.
> Marshall *vs.* Burtis, 172 U. S., 635.

II.

The Facts Stated in the Opinion of the Court Below Are Variant From Those Stated in Its Formal Findings.

The judgment of this court is based wholly upon the statements of fact made in the opinion of the court below, and not upon the facts as given in the formal statement of its findings of fact signed and certified by the court below (Rec., 45, 46, and 18–30); the latter are not referred to in the opinion of this court.

By a contrast of the facts as given in the opinion of the court below with those set forth in its findings, it will be seen that the former are contradicted in material particulars by the latter.

The following facts are established by the formal findings, viz.:

Under date of June 16, 1893, three corporations, the Gila Bend Reservoir and Irrigation Company, appellant herein, the Arizona Construction Company, and the Peoria Canal Company entered into an agreement for the settlement "of all differences and controversies, and an adjustment of all contracts" existing between the Arizona Construction Company and the Gila Bend Reservoir and Irrigation Company (Rec., 19).

The litigation in the two cases No. 1728 and No. 1996, mentioned in the record, arose upon this agreement and had relation to certain lands and water rights belonging to the Gila Bend Reservoir and Irrigation Company, which were transferred by it to the Peoria Canal Company in accordance with and for the purposes mentioned in the agreement. The title of appellee, the Gila Water Company, is based upon decrees passed in No. 1996 for the sale of the property, and is dependent for its validity upon the jurisdiction of the trial court to pass such decrees.

The jurisdiction of the trial court is questioned by appellants seventh assignment of error, in which it is claimed that its judgment in case No. 1996 was, and is, absolutely void, in that the action was one *in rem* and that no act was done in the case No. 1996, by which jurisdiction over the *res* was acquired by the court.

In contrasting the facts set forth in its findings, with those stated in the opinion of the court below, with a view to showing that the latter are not supported by the findings, a brief reference to the agreement of June 16, 1893, and to the proceedings had in cases No. 1728 and No. 1996, as shown by the record, is necessary.

The Agreement of June 16, 1893.

The agreement provided for the dissolution of an injunction which had been obtained by the Gila Bend Reservoir and Irrigation Company against the Arizona Construction Company; that the latter company should pay off all contractor's liens; that title to the property of the Gila Bend Reservoir and Irrigation Company should be made perfect in the Peoria Canal Company; that the Canal Company should issue its promissory notes to the Construction Company, payable on or before two years, with interest for all moneys invested by the latter, with the interest thereon, the amount of the notes to be determined by verified statement of the treasurer of the Construction Company; that all the capital stock of the Canal Company should be deposited in escrow as security for the notes; that the Canal Company should issue $750,000 first and $350,000 second mortgage bonds; that all of the parties should aid in the sale of them; that the proceeds of the bonds should be used in paying off the notes, and if the notes were paid within two years from such proceeds, or by the Gila Bend Reservoir and Irrigation Company, the capital stock of the Peoria Canal Company should be delivered to the Gila Bend

Reservoir and Irrigation Company, and that the expense of maintenance and repairs should be paid from the proceeds of the bonds or from the sale of water rights (Rec., 19).

In compliance with the agreement the Gila Bend Reservoir and Irrigation Company turned over all its property, land, and water rights to the Peoria Canal Company, and the Canal Company took possession of it.

Case No. 1728.

After the lapse of upwards of three months from the date of the agreement, and on September 23, 1893, the Gila Bend Reservoir and Irrigation Company filed its complaint in the District Court of Maricopa County, against the Construction Company and the Canal Company, averring that it was the equitable owner of the property and that nothing had been done by the defendants to carry the agreement into effect, and praying that the Construction Company be required to forthwith make and deliver to the Canal Company the verified statement of its claims as provided in the agreement; that upon its receipt the Canal Company be required to issue its notes to the Construction Company, and to deposit its capital stock in escrow as required by the agreement; and that the Canal Company be restrained from issuing notes of any date prior to the receipt of such verified statement, and from doing any act or thing except as provided in the agreement (Rec., 19, par. 3, and Rec., 20, par. 5).

The Canal Company answered claiming to be "the legal and equitable owner in fee" of the property; stating the verified statement of the Construction Company had been made October 5 (subsequent to the filing of the complaint); admitting that its capital stock had not been placed in escrow; stating that as soon as the Construction

Company had paid its debts to subcontractors and others it would issue the notes under the agreement and that they would be dated June 19 (16?), 1893, etc. (Rec., 20, par. 5, foot of page).

Testimony was taken on both sides and closed on November 27, 1893 (Rec., 25, III).

On December 4, 1893, the defendant, Peoria Canal Company, applied for the appointment of a receiver "to repair, operate, and control the property" (Rec., 20, par. 4), and on December 6, 1893, on this application the court appointed James McMillan receiver of the property with power to bring and defend suits, to receive and collect rents, to repair and rebuild the property, and to save it from loss by reason of liens and judgments. Ibid.

The case was argued and submitted January 4 and 5, 1894 (Rec., 25, III). It was not decided until February 18, 1899, upwards of five years after it had been submitted, and was ripe for judgment (Rec., 24, par. 10).

From the decree passed February 18, 1894, which dismissed the bill with costs, an appeal was taken to the Supreme Court of the Territory by the complainant, the Gila Bend Reservoir and Irrigation Company, which was perfected April 11, 1899 (Rec., 24, par. 10).

In the findings of fact by the court below, in the case at bar, it is expressly stated that—

> "no order was in terms made extending the receivership in case No. 1728 to the case No. 1996, under the proceedings in which appellee claimed title, and that no order was made by the trial court consolidating the two cases" (Rec., 45, last two paragraphs).

The especial attention of the court is called to the fact that it is thus shown that the receiver was not appointed upon the application of the complainant (appellant herein), as assumed in the opinion of the court below,

and by this court by its adoption of that opinion, but upon the application of the defendant, the Peoria Canal Company, and to the further fact that the trial court did not exercise the power with which it was vested under sec. 921, R. S. U. S., by the passage of any order in the case which linked or connected it in any manner with the case No. 1996. Case No. 1728 was tried and submitted in the trial court as a suit, separate and distinct from any other, and certainly from case No. 1996, which had not then been instituted. The separate and distinct character of cases No. 1728 and No. 1996 is emphasized by the unsuccessful efforts made on November 2 and 23, 1898, in case No. 1728 by the complainant, the Gila Bend Reservoir and Irrigation Company, to have McMillan, the receiver appointed in No. 1728, restrained as such receiver from executing the decree in No. 1996, until he was so ordered by the court, in said case No. 1728 (Rec., 29, par. 22, last clause, and Rec., 29, par. 23, first clause).

Case No. 1996.

On May 23, 1894, nearly five months after case No. 1728 had been argued and submitted in the District Court, case No. 1996 was brought in that court.

Linn and others who claimed to be creditors at large of the Arizona Construction Company, for moneys advanced the latter and used by it in constructing a canal and dam for the Gila Bend Reservoir and Irrigation Company, were complainants; the Gila Bend Reservoir and Irrigation Company, the Arizona Construction Company, the Peoria Canal Company, and others, were defendants. The receiver in case No. 1728 was not made a party.

All of the complainants were stockholders and officers of the defendants, the Construction Company and the Canal Company (Rec., 28, par. 15).

The complainant averred that the agreement of June

16, 1893, was entered into without the consent of complainants and was in fraud of their rights and that the parties thereto were insolvent. It further averred that the court had on December 6, 1893, appointed a receiver who had taken possession of the property and that he "still holds possession of the same."

The bill prayed that the court appoint a receiver or enlarge the powers of the present receiver and take possession of the property and sell the same to pay proved debts (Rec., 21 and Rec., 25, IV).

None of the defendants were served with process except the appellant herein (Rec., 21).

The Arizona Construction Company answered on the day following that on which the bill was filed, and the Peoria Canal Company on the third day thereafter. The answers admit the averments of the complaint, and consent to the granting of the relief prayed (Rec., 21). The collusive character of the suit, as between the complainants and the defendants, other than the Gila Bend Reservoir and Irrigation Company, is shown by these answers and the answers of other defendants. Greenhut and Francis, two of the defendants, answered, stating that the acquisition of the property by the Peoria Canal Company was without their knowledge, and was in fraud of the rights of complainants. The record shows that Francis was a director in the Arizona Construction Company and the president of the Canal Company, and that as such he signed the agreement of July 16, 1893, under which the Canal Company acquired the property (Rec., 22, top of page). Burnett, another defendant, was represented by attorneys who were of counsel for complainants (Rec., 22).

The defendant, the Gila Bend Reservoir and Irrigation Company, moved for a change of venue and filed an affidavit of "bias and prejudice" which was overruled and exception taken (Rec., 23, par. 8; Rec., 32, par. 14). It

then filed a demurrer and general denial (Rec., 22, at marginal page 24).

On July 21, 1894, the court passed a decree in No. 1996 in favor of the complainants and therein directed—

> "that James McMillan, the receiver heretofore appointed by this court and now in possession of said premises under the orders of this court, proceed to advertise and sell said property and distribute the proceeds,"

as directed in the decree (Rec., 22, par. 6).

The defendant, the Gila Bend Reservoir and Irrigation Company, moved for a new trial; the motion was overruled; notice of appeal from the decree of July 21, 1894, was given in open court (Rec., 28). The appeal was perfected on November 12, 1894, and the transcript was filed January 9, 1895 (Rec., 29, top of page).

The trial court, notwithstanding the matter had thus passed from its jurisdiction, passed an amended decree on November 20, 1894, and thereby directed McMillan " the receiver heretofore appointed by this court, and now in possession of the property to advertise and sell the same and distribute the proceeds," as directed in the latter decree (Rec., p. 23). The defendent, the Gila Bend Reservoir and Irrigation Company moved for a new trial, under the latter decree, and the motion being overruled, appealed (Rec., 20, par. 7, 24; Rec., 25, IV). Case No. 1728 is not mentioned in either decree, by title or number.

It is expressly stated, in the findings of fact, by the court below, in the case at bar, "that no order was in terms made extending the receivership in case No. 1728 to case No. 1996, under the proceedings in which appellee claimed title and that no order was made by the trial court consolidating the two cases" (Rec., 45, last two paragraphs).

The especial attention of the court in this connection

is also called to the fact that the trial court in case No. 1996 did not, prior to the perfection of the appeals from the decrees therein, exercise the power with which it was vested under sec. 921, R. S. U. S., by the passage of any order in the case which linked or connected it in any manner with case No. 1728. Case No. 1996 was proceeded with in the trial court as a separate and distinct suit from case No. 1728, from its inception to the perfection, on November 12, 1894, of the appeal, by the defendant, the Gila Bend Reservoir and Irrigation Company, from the decree of July 21, 1894, and case No. 1728 had not been mentioned in it by number or title.

The receiver made a report of sale on January 3, 1895, of the property by him to Crowley, which he entitled in both causes No. 1728 and No. 1996; the *only order* of the trial court entitled in both cases was one passed on January 10, 1895, after the perfected appeal, confirming said sale (Rec., 24, par. 9). By that order appellant was not bound; the record fails to show any acquiescence in it, on his part, or in the decrees of July 21, 1894, or November 23, 1894; to the contrary the record shows that appellant moved for a new trial as to both decrees and that it appealed from both.

The property could only have been sold by the receiver at a sacrifice. The jurisdictional defects in the record, affecting his power to sell, were so obvious, as to preclude bids upon it from prudent persons, and to prevent fair competition.

Bearing in mind the fact that when the Arizona Construction Company first attempted to force a sale of the property, and was restrained, as recited in the agreement of June 16, 1893, it had created The Peoria Canal Company, to buy it in at the expected sale (Rec., 26, VII), and further bearing in mind the facts to which attention has been called, indicating that case No. 1996 was a

collusive suit, the inference is a fair one, that the Construction Company was the real purchaser of the property at the receiver's sale, and for a price less than it would have brought at a sale, the validity of which was not thus open to question.

Complainants in No. 1996 aver in their bill the fact that the property of which a sale was prayed was in the possession of a receiver appointed in another case and to the end that it might be brought within the jurisdiction of the court in their suit, pray the court to take possession of it by the appointment of a receiver therein or by an enlargement of the powers of the receiver in the other case.

The complainants in case No. 1996 knew that the receiver in the other case, and who as such had possession of the property, could not be sued as such in case No. 1996 without leave of the court. No such leave was obtained. Apparently the complainants proceeded upon the theory that the court in order to acquire the jurisdiction over the property which was essential to the scheme of the bill, would pass an order making the receiver in the other case a party, and would then either appoint some other person as receiver or appoint the same person as receiver in No. 1996 and enlarge his powers. In no other way could the *res* be lawfully seized.

The complainants took no steps to procure the passage of such order, and none was passed.

The rule is stated by this court in Express Co. *vs.* Railroad Co., 99 U. S., 191, 198, as follows:

> "The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was *by consent* of the court. Without this latter fact, the bill could not have been

> filed or maintained. The suit would have been a contempt of the court, which had appointed the receiver, and punishable as such."

See, also, American L. and T. Co. *vs.* Central Vermont R. Co., 86 Fed., 390, 392, where it is said:

> "The substance of the whole is that those who claim the disposition or possession of property, in the hands of receivers of a court, must come to that court, *in that case*, to reach it, and an independent suit for that purpose can not be maintained, *even in the same court*. Leave of court to file a bill separately must be had in the original cause, and this annexes a new bill to that cause, and amounts to the same thing as filing it in that cause."

If by reason of this oversight the court failed to acquire jurisdiction of the property and its orders for its sale were void, the fault is not appellants. It was not bound to procure such order. Mere acquiescence by it in the proceedings, or even an oral arrangement between it and the other parties in regard to them, could not confer jurisdiction. There was no consent, and even if there had been, jurisdiction could not have been acquired by it.

As to this, Merril *vs.* Petty, 83 U. S., 346, 347, cited in appellant's brief, (p. 33), is directly in point.

It was contended by counsel for appellant in the court below and in this court, in the brief and in the oral argument, that the case No. 1996 was a proceeding *in rem* strictly, and that by the failure to make McMillan the receiver appointed in the case No. 1728, and in whose possession as such receiver the property was, as stated in the bill, of which a sale was made, a party to the suit No. 1996, and by the failure to consolidate the two cases, they were left standing as separate, independent suits; and that, under the circumstances, the court, in 1996,

failed to acquire jurisdiction over the *res*, and that its order in that case directing the receiver in the other case to make a sale of the property was ultra vires and void.

This contention is well sustained by the authorities cited in the brief (pp. 27–29).

The court below sought to avoid the force and effect of appellant's contention by stating in its opinion that:

> "All the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver appointed in cause number 1728, as though it had been placed in his possession as receiver appointed in cause number 1996; and, further, that orders were made by the court concerning the said receivership which were entitled in both suits jointly; and held that, although no order was made consolidating the two suits and no order was in terms made extending the receivership to the second suit, number 1996, the receivership was, in fact, extended to the second suit; and that the court by its action ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit."

And it then held that:

> "The view thus taken was amply justified by an inspection of the records in the two suits, and upon this ground alone the action of the trial court in admitting the judgment was correct."

Distinguished from the mere matters of opinion in these assumptions of the court the matters of fact as above shown are controverted by the record and are unfounded.

Appellant did not treat the property in the possession of the receiver in case No. 1728 as though it had been placed in his possession as receiver appointed in case No. 1996; the record shows that throughout the proceedings the appellant was a resisting party and neither consented

to nor acquiesced in anything that was done in the case. The record shows not that "orders" were made by the court concerning the receivership which were entitled in both suits jointly, but that one such order only was made, and that this single order was made after the testimony in both suits had been closed, and the suits were pending in the appellate tribunal.

Whether in the absence of any order making the receiver in case No. 1728 a party to case No. 1996 and of any order of consolidation the receivership in case No. 1728 was, under the circumstances, extended to the second suit, No. 1996, is a question to be tested solely by the record and not by the impressions in the mind of the court below, and judged by this test there was no such extension; and whether the court by its action in passing the single order above mentioned, which is dated January 10, 1905, ratifying the sale made by the receiver, extended the power and authority of the receiver to the second suit, depends upon the state of the record antecedently; and this not only shows that the order of January 10, 1905, was passed after the decree for the sale and after the appeal in the case No. 1996 had been perfected and the transcript of the record delivered to the Supreme Court of the Territory (Rec., 29, par. 19), but that the court was otherwise without jurisdiction in the case.

The conclusion of the lower court that the assignments of error as to the absence of jurisdiction in the trial court in case No. 1996 was unfounded is, therefore, based upon erroneous premises; and it is respectfully submitted that the action of this court in adopting that conclusion and following the reasoning of the lower court is necessarily open to the same criticism.

In neither the opinion of the court below nor in that of this court are the facts upon which the judgment is

based deduced from the facts certified by the lower court. In the opinion of this court it is said:

> "It is clear from the record that the District Court *considered* the cases pending before it at the same time, *considered* 1996 as the complement of 1728, *regarded* the cases as in fact consolidated, *empowered* the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996."

The court below was without power to confer jurisdiction upon itself in this manner over the property; such jurisdiction could only be acquired in the regular method of procedure prescribed by law. This was not pursued.

To be entitled to any weight in determining the propriety of its decision, the considerations upon which the court below acted should be supported by the actual facts in the case.

It is respectfully submitted in conclusion that upon the showing above made the prayer for a rehearing in the case should be granted.

HUGH T. TAGGART,
Attorney for Appellant.

I hereby certify that I became of counsel for the appellant since the judgment of this court was rendered in the above-entitled case; that Mr. Prentiss, by whom appellant's brief was prepared and the oral argument in his behalf made, left the city of Washington before the announcement of the decision, and is traveling from place to place in the far west, and that I have not been able to communicate with him, and that in presenting the

above petition I am merely performing a friendly office in his behalf.

I have examined the transcript of the record and have read the opinion of this court in the case, and, to the best of my knowledge and belief, the facts set out in the foregoing petition appear of record herein, and that this petition is filed in good faith, and is not presented for the purpose of delay.

HUGH T. TAGGART.